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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 480

ROBERT MORALES, *et al.*,

Petitioners,

—vs.—

CITY OF GALVESTON, *et al.*,

Respondents.

BRIEF ON THE MERITS

FOR PETITIONERS, ROBERT MORALES, MIGUEL MEJIA, APOLONIO OVALLE, NICK DE LEON, FIDENCIO BALLI, MICHAEL SERRATO, AND JUAN ARRENDONDO

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT, NEW ORLEANS, LOUISIANA

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I.

Former Opinion of This Court

The opinion of the United States Supreme Court, granting Petitioners certiorari vacating the judgment of the Court of Appeals dated October 17, 1960 is reported in 364 U.S. 295.

II.

Opinions Below

Opinion of the District Judge is reported at 181 F. Supp. 191; opinion of the Court of Appeals for the Fifth Circuit is dated May 17, 1961, 291 F. (2d) 97, reaffirming its own opinion and judgment reported at 272 F. (2d) 191, and reaffirming the District Court's judgment denying recovery to longshoremen for injuries sustained in the course of their employment while loading a vessel when the last batch of wheat loaded in the hatch where Petitioners were working was contaminated with poisonous gases rendering unfit quarters, i.e., hatch not reasonably fit to do the work with reasonable safety even though until that batch of grain was introduced the hatch was seaworthy.

III.

Jurisdiction

Judgment of the United States Court of Appeals for the Fifth Circuit here sought to be reviewed was entered on the 17th day of May, 1961.

The jurisdiction of this Court to review by Writ of Certiorari the judgment complained of is conferred by Title 28, U.S.C.A., Sec. 1254(1) and 2101(c). The opinion of the Court of Appeals for the Fifth Circuit reaffirms its former opinion and judgment entered on the 22nd day of February, 1960.

IV.

Questions Presented for Review

1. Can a hatch in a vessel, staunch and fit for the service intended of receiving grain, become unseaworthy, i.e., not

reasonably fit to do the required work with reasonable safety by the introduction of contaminated grain, even though the owner had not expected that contaminated grain would be loaded into the hatch.

2. Is notice, actual or constructive, that contaminated grain was introduced into the hatch where longshoremen were working rendering said hatch not reasonably fit to trim the grain with safety, i.e., unseaworthy, caused by the introduction of a batch of grain which contained poisonous gases producing personal injuries to longshoremen working in the hatch for the purpose of trimming such grain,[1] an essential element of recovery.

3. Is notice, actual or constructive, of the sudden and unexpected presence of noxious and injurious fumes from a batch of grain poured into the hatch where longshoremen were working for the purpose of trimming it in the hatch, an essential element of recovery under the doctrine of unseaworthiness.[2]

4. Whether the Trial Court's Findings of Fact Nos. 9, 10, 11 and a portion of 19 establish unseaworthiness as a matter of law.

5. In view of the Trial Court's Findings of Fact Nos. 9, 10, 11 and a portion of 19 which establish unseaworthiness was the Appellate Court in error in affirming and reaffirming the Trial Court's conclusion that the hatch was not unseaworthy.

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[1] See Trial Court's Findings of Facts Nos. 9, 10, 11 and a portion of 19, T.R. pp. 85, 86 and 92.

[2] See Trial Court's Findings of Facts Nos. 9, 10, 11 and a portion of 19, T.R. pp. 85, 86 and 92.

6. Whether a Trial Court's conclusion "that the vessel was not unseaworthy" be deemed "a Finding of Fact" subject to the clearly erroneous rule in the face of the Trial Court's specific findings 3, 9 and 11, which spell out unseaworthiness as a matter of law.

7. In view of the knowledge of the City of Galveston and the Cardigan Steamship Company through its agent Texas Transport and Terminal Company of at least four prior incidents in which a substantial number of longshoremen were injured while trimming grain loaded by Respondent City of Galveston, under exactly the same circumstances, was the failure of Respondent steamship company and the City of Galveston to test the grain as it leaves the last bin of the City's warehouse and before it is channeled into the spout while loading aboard the vessel negligence.

8. Whether the damages found by the Trial Court were inadequate as a matter of law.

Brief Statement of the Case

This case involves a libel filed by eight longshoremen employed by Texports Stevedoring Company, a subsidiary of Texas Transport & Terminal Company, Cardigan's Agent, to recover damages for personal injuries sustained by them on the 14th day of March, 1957, while they were working in the hold of the SS GRELMARION.

1. As to the Respondent, Cardigan, it was contended that the vessel was not seaworthy in that:

(a) As a quantity of grain containing the poisonous and dangerous fumigant entered the hold, it became dangerous and unsafe place for Petitioners, and therefore the shipowner breached its non-delegable duty to supply Petitioners with a reasonably safe place in which to work;

(b) That the hatch became unseaworthy, i.e. not reasonably fit to do the work with safety;

(c) That Respondent Cardigan as owners and operator of the SS GRELMARION was negligent in that tests and other precautions against the happening of such incident have not been taken at the last bin in the warehouse before it began its journey into the spout and thence into the hold of the vessel;

(d) That Respondent Cardigan through its agent, Texas Transport & Terminal Company having had full knowledge of at least four prior incidents in which longshoremen doing the same work on vessels moored at the Galveston docks were injured and were paid damages by reason of being overcome by gaseous fumes from treated grain while trimming it (as here) were charged with knowledge of the dangerous condition that would most likely arise, and failed to take measures to discharge its non-delegable duty to petitioners to provide a safe place in which to work, i.e. provide blowers to force air into the hatch where Petitioners were required to work.

2. As to the City of Galveston Petitioners claimed that the City was negligent in:

(a) Fumigating the wheat in question for the purpose of killing weevils and that the fumigant used was a strong and dangerous chemical harmful to human beings when exposed to its fumes;

(b) That by reason of prior incidents of similar nature the City had knowledge of the danger and the probability of harm, and should have exercised a high degree of care or alternatively ordinary care

in fumigating the wheat in such a manner that persons such as longshoremen while working with it would not be injured by the poisonous fumes;

(c) That if the fumigants were not applied by the City in its elevators or railroad cars at the dock near the elevator, but inland and before the grain reached the City elevators, the City having knowledge of such practice should have made proper inspection of the grain in order to determine the presence of such fumes and gases, so that, when placed in the hatch of a vessel, without any air or ventilators, persons working therein would not be injured.

Trial Court's Pertinent Findings as to Unseaworthiness

The Trial Court's Findings of Facts Nos. 9, 10 and 11, T.R. p. 85, and the Court of Appeals in both of its opinions confirmed these findings that on March 14, shortly after 1:00 o'clock, when these Petitioners returned to work, the bin in No. 2 hatch was practically full and another "shot" of grain of approximately five hundred (500) or so bushels were poured into the hatch which covered the entire opening of the hatch, the flood of grain closing the hatch and shutting out the air completely leaving these longshoremen trapped without air and exposed to the poisonous gases and fumes which injured them as follows:

"9. The GRELMARION began loading the morning of March 13, 1957, and continued without incident throughout that day and the following morning, until interrupted for the lunch hour on March 14. When the longshoremen returned to work in the offshore bin of the No. 2 hold at about 1 p.m., on March 14, 1957, the bin was approximately three-fourths full, the grain

then extending to within some four or five feet of the top of the bin. A last 'shot' of grain was called for, and was released into the bin. *This quantity of grain completely covered the hatch opening* (which was the only means of entrance and exit for the longshoremen, *and was the only source of ventilation*); the longshoremen were working *for the moment in an area, completely enclosed and without access to outside air.* This in itself was not an unusual incident. (Emphasis ours)

10. Almost immediately the longshoremen felt ill effects. This was manifested by a burning and stinging sensation in the nose and throat, watering of the eyes, and a choking sensation. A certain amount of hysteria developed. The attention of those on deck was attracted, and the spout was shut off. The men dug a passageway through the grain and climbed and were assisted to the deck and the open air. Some experienced nausea and dizziness.

11. I find as a fact that certain noxious fumes and gases were introduced into the bin with the last 'shot' of grain which was loaded after 1 p.m., and that such fumes resulted from an insecticide applied at some point to destroy weevil infestation. I further find that the condition and complaints of the Petitioners were not—as the Respondent City contends—attributable solely to a temporary oxygen deficiency in the bin, coupled with hysteria.

19. The finding heretofore has been made that the noxious gases and fumes were introduced into the bin with the last 'shot' of grain, and resulted from a fumigant that had been improperly applied, and that had adhered to the grain an unusually long period of time. • • • "

It is respectfully submitted that these Findings constitute findings of unseaworthiness. The Court in effect states that the hatch in which Petitioners were working was safe in all respects until the last "shot" of grain which was contaminated, rendered the place, i.e., the hatch, not reasonably fit to do the work with safety. The Trial Court's conclusion on the last part of Finding of Fact No. 19, that "Under these circumstances I find that the admission thereof into the bin of the vessel *did not cause the GRELMARION to become unseaworthy, the vessel and all its appurtenances being entirely adequate and suitable in every respect,*" is directly contrary to the decision by this Court in the *Mitchell* case, *supra.* (Emphasis ours.)

The Undisputed Facts

The loading began on March 13, 1957, while the SS GRELMARION, owned by the Respondent Cardigan Steamship Company, was berthed in Galveston, Texas, at a wharf adjacent to elevator "B" engaged in the loading of wheat from the elevator.

Elevator "B" is owned and operated by the City of Galveston, commonly referred to as "Galveston Wharves" for the purpose of storage and shipment overseas by vessel (R. p. 577). A small amount of grain is received by truck and barge (R. p. 595).

On the arrival of a car, the Galveston Cotton Exchange Board of Trade, grain department samplers go into the line haul railroad yards, break the seal on the car, open it and take samples from each car. The samples are then brought to such organization's laboratory (R. p. 596). The sampling, however, is for the grade of the grain and is not sampled for any fumigants (R. p. 598). The City then using its own shovels unloads the grain into a pit underneath

the car and thence by a system of rubber conveying belt with approximately 1,000 buckets on it picks the grain out of the pit (R. p. 604) and on to the elevator where it is weighed, then through chutes into storage bins (R. pp. 606-611).

When it comes to getting the grain out of the elevator, a mixture is usually made of various grades, which when taken together in certain proportions will come out as the grade ordered by the owner or shipper (R. p. 616). In order to get the type of grain ordered, it is invariably necessary to mix the grain from the numerous bins in the elevator. The grain leaves the several bins by way of an open conveyor belt until it comes to a common point (R. p. 619). The grain then goes on a joint belt up to scales where it is weighed, thence on to a belt that delivers it from the workhouse to the wharf (R. p. 620). Upon reaching the wharf, it goes into a shipping bin which is above the shipping gallery and immediately above the ship to be loaded (R. p. 620). The stevedores then place the dock spout in position so that the grain will be loaded into the desired hatch on the vessel. The stevedores then telephone to the elevator telling them to start releasing the grain (R. p. 621). See detailed testing of Carroll (R. pp. 593-623) particularly (R. p. 608):

> "Mr. Carroll: *In other words, we have a co-mingled house, all classes and grades are binned co-jointly* • • •" (Emphasis ours.)

The loading of the GRELMARION began on March 13, 1957, and continued the following morning until noon, which proceeded without any untoward event. Shortly after 1:00 o'clock, when these Petitioners returned to work in the bin in No. 2 Hatch, the bin was practically full and another shot of grain of approximately five hundred (500) or so

bushels was put into the hatch which covered its entire opening. This trapped Petitioners and they immediately felt ill from the effects of the chemicals with which the grain was treated. They, and some other workmen from on top of the deck, dug a passageway through the grain and climbed out and were assisted to the deck, in the open air. All experienced nausea and dizziness and were treated by physicians for some periods of time thereafter.

It is undisputed that no test of the grain was made for the purpose of determining whether it was contaminated with poisonous or gaseous fumes from fumigant with which the grain was treated either while it was in the City's elevator, the railroad cars before it was placed into the City's elevator, or at an inland point from whence it was shipped. Similar incidents occurred before, resulting in injury to longshoremen trimming grain in vessels being loaded with grain from elevators owned and operated by Respondent City of Galveston. These previous incidents were known to both the City of Galveston, as well as Texas Transport and Terminal Company, Cardigan Shipping Company, Ltd.'s Agent. Trial Court's Findings of Fact, Nos. 17 (a)-(b)-(c)-(d), T.R. pp. 89-90-91-92 reads as follows:

> "I find—as Libellants contend—that several incidents not unlike that giving rise to the present action have occurred in Galveston, and I further find that all parties hereto, namely, the Libellants, some of whom were therein involved, the vessel (through her Galveston agents), and the City, all had actual knowledge thereof. These are as follows:
>
> (a) In 1949, while the LIPSCOMB LYKES was loading grain at Galveston, a similar incident occurred in which some 140 longshoremen working in various holds of the vessel were sickened and made ill by fumes from grain being loaded. Judge T. M. Kennerly, of this

Court, found as a fact that the City had fumigated the grain in question; that it had done so negligently by using excessive quantities of fumigant, and by failing properly to aerate the grain. By reason thereof, liability was imposed on the City (Ad. No. 1909, S.D. of Tex., Galveston Div., July 16, 1952; Aff'd, City of Galveston v. Miranda, 205 F. 2d, 468 (5th Circ.)).

(b) In 1950, a number of longshoremen were similarly affected while loading grain aboard the PANAMOLGA in Galveston. Only the vessel and her owner were libeled, and the City, as operator of the elevator, was not a party to that proceeding. Judge Thomsen, of the U.S. District Court for the District of Maryland, absolved the vessel and her owners of blame, and found the PANAMOLGA seaworthy. The Court was of the view (in the absence of the City) that the fumigant had been applied in and by the elevator, and found as a fact that whatever fault there was, was that of the City, in that the City had agreed to notify the ship's agent when grain recently fumigated was about to be loaded, and that no such notice was given to the agents of the PANAMOLGA in that case. (McMahon v. The Panamolga, 127 F. Supp. 659.)

(c) In 1953, the ZOSIANNE, while loading grain at Galveston experienced a somewhat similar incident. An action was filed in this Court by a number of longshoremen to recover for alleged injuries from having breathed noxious fumes (Ad. 1937, Galveston Div.), charging that fumigants were applied by the City to grain in the elevator. This action was settled, and was never tried.

(d) There is some mention in the evidence of a comparable incident on the MORMACMOON in 1950. The

evidence as to what transpired in that instance is not clear, only that a comparable claim was made."

Notwithstanding such findings, the Trial Court, 181 F. Supp. 191, affirmed on appeal, 275 F. (2d) 191, 195, holding Cardigan Steamship Company, Ltd., not liable, saying in effect that the situation was caused by an "unexpected", "transitory" condition of which the shipowner had no notice. On remand from this Court the Court of Appeals reaffirmed its former decision again on the unexpected, i.e., transitory doctrine theory because the shipowner had no notice and did not *expect* that grain so contaminated would be loaded into the bins. 291 F. (2d) 97. The Court holding that the ship was at all times seaworthy and fit for its service of receiving *uncontaminated* grain. We respectfully submit that there is no distinction between the facts as found by the Trial Court confirmed on appeal and the facts in the *Mitchell* case. If there be a distinction, it is a distinction without a difference.

The Court did not make any Findings of Fact of the failure of the Cardigan Steamship Company, Ltd. to use blowers to force air into the hatch so that in the event the hatch bin would be closed by the flood of grain, contaminated or otherwise, and cut off all air, there would still be air forced into it.

In view of Findings 9, 10, 11 and 19, the Trial Court, obviously mindful of the confusion and conflict created by the *Cookingham, Adamowski, Petterson* and *Poignant* cases, made findings as to damages (which we submit as shown under proper assignment, are wholly inadequate, apparently uncertain how or when the confusion would be cleared or the conflict resolved).

Proposition Number One

A hatch in a vessel, staunch and fit for the service intended of receiving grain becomes unseaworthy, i.e. not reasonably fit to do the required work with reasonable safety by the introduction of contaminated grain, even though the owner had not expected that contaminated grain, producing personal injuries to longshoremen working in the hatch for the purpose of trimming such grain, even though the owner had no knowledge that contaminated grain would be loaded into the hatch.

Proposition Number Two

The Trial Court's Findings of Fact Numbers Nine, Ten, Eleven and a portion of Nineteen establish unseaworthiness as a matter of law, see Appendix A.

Proposition Number Three

The Trial Court's Specific Findings of Fact, Numbers Nine, Ten and Eleven do not support the Trial Court's conclusion that "the vessel was not unseaworthy" but is directly contrary to such Findings of Fact.

Argument and Authorities

In view of the inter-related questions, presented in Propositions Numbers One, Two and Three, we believe we can best aid the Court by presenting them together.

This Court's opinion in *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, is clear authority to support Petitioners' contention that the Trial Court's Findings of Facts Nos. 9, 10, 11 and a portion of 19 establish unseaworthiness causing Petitioners' injuries and are therefore entitled to recovery.

As so ably stated by Judge Rives in his dissent, there is no real distinction between *Mitchell* and this case. The Court of Appeals in its original opinion, 275 F. (2d) 191, attempted to distinguish the facts in this case from the First Circuit's decision in the *Mitchell* case, 265 F. (2d) 426, as follows (page 99, 291 F. (2d)):

> "* * * This is not a case of something transitory occurring to prevent the ship from being reasonably fit to permit a libellant to perform his task aboard the ship with reasonable safety and, *persisting* without being discovered, causing injury such as is dealt with in the Mitchell case, supra, and the other cases cited by appellants. This is a case of a happening 'when the last batch of wheat came out of the funnels', *instantaneously* rendering unfit quarters which until then had been, and, when the funnels cleared away, continued to be, entirely seaworthy."

Obviously this Court was not persuaded by the distinction made by the Court of Appeals of the *Mitchell* case and the case at bar and in view of this Court's decision in *Mitchell*, obviously the distinction is not sound.

Justice Harlan when sitting on the Court of Appeals for the 2nd Circuit dealt with a similar situation in *Dixon* v. *United States*, 219 F. (2d) 10, p. 14, he cites *Hawn* v. *Pope & Talbot, Inc.*, 3rd Cir., 1952, 198 F. (2d) 800, affirmed, 1953, 346 U.S. 406, 74 S.Ct. 202 stating:

> "unsatisfactory working conditions held to be within the seaworthiness doctrine, although the vessel itself and her appliances were seaworthy."

Thus in *Valerio, et al.* v. *American President Lines, Limited, et al.*, 112 F. Supp. 202, District Judge Bondy, an experienced Admiralty Judge, held that the hatch in which

drums of cashew nut oil were stowed (like the case at bar) and all the vessel were in all respects seaworthy and reasonably fit to receive and to hold the drums of cashew nut oil. The Court nevertheless held the shipowner liable because the drums were leaking and the cashew nut oil caused the longshoremen discharging the drums of oil to develop dermatitis. The shipowner settled with the longshoremen and filed its third party action against the stevedoring company. The District Judge in discussing the shipowner's liability to the longshoremen stated as follows (p. 203):

> "Respondent's liability to libellants Kulakowski, Liquori and Cupo, who handled the drums or equipment on the ship, can not be questioned. In Anderson v. Lorentzen, 2 Cir., 1947, 160 F. 2d 173, which likewise involved cashew oil, it was held that the owner of the ship was under a duty not only to provide libellants with a seaworthy ship upon which to work, but also to provide them as business invitees with a reasonably safe place to work and to warn them of the dangers of handling cashew nut shell liquid. This duty of the shipowner was held to be nondelegable and the shipowner was held liable to the longshoremen notwithstanding any concurrent duty on the part of a stevedoring company."

Following the *Valerio* case, this Court decided the *Mitchell* case eliminating the requirement of notice or prior knowledge of the condition. In so doing Justice Stewart quotes with approval from the *H. A. Scandrett* case, C.A. 2nd Cir. 87 F. 2d 708, as follows:

> "In our opinion the libellant had a right of indemnity for injuries arising from an unseaworthy ship even though there was no *means of anticipating trouble.*" (Emphasis ours.)

In the case at bar the District Court quoted with approval by the Appellate Court, found:

> "This is a case of a happening 'when the last batch of wheat came out of the funnels' instantaneously rendering unfit quarters which until then had been, and, when the funnels cleared away, continued to be entirely seaworthy."

Judge Hoffman quotes with approval from the Law of Maritime Personal Injuries by Norris, Sec. 36, page 85:

> "For the 'instantaneous act' makes the vessel just as unseaworthy to the injured person, as it would if the defective condition was put into motion a minute or an hour before the time of injury."

See *Holley, Admnx.* v. *The Manfred Stansfield*, 1960 A.M.C. 1956, 186 F. Supp. 212.

See also *McFall* v. *Compagnie Maritime Belge, et al.*, 1952 AMC 1860. In the *McFall* case longshoremen were injured by fumes leaking from steel drums of carbon tetrachloride they were unloading. Recovery was allowed.

Since the *Mitchell* case, in which sudden and unexpected situations, created without fault of the shipowner, rendering the area in which the longshoremen were working not reasonably fit to do work with safety have been declared to be an unseaworthy condition and if such condition caused injury recovery was allowed. *Grzybowski* v. *Arrow Barge Co., Inc.*, 283 F. (2d) 481, C.A. 4th Cir. In that case a longshoreman received an injury because a slippery, dangerous and hazardous condition was created by the use of soap which was supplied by the stevedoring company and Plaintiff was injured because he slipped on the soap. The Court in charging the jury stated that in order to maintain a seaworthy ship "the owner is not required to keep the

appliances or work spaces which are inherently sound and seaworthy absolutely free at all times from transitory, occasional or immediate unsafe conditions resulting from their use; * * *." The jury found for the Defendant. The Court of Appeals for the 4th Circuit reversed, stating:

> "It is now well settled that a shipowner's obligation to maintain a seaworthy vessel, traditionally owed by shipowners to seamen, extends to a stevedore who is injured while aboard and loading the ship, although employed by an independent stevedoring contractor engaged by the owner to load the ship. For purposes of the liability for injury, a stevedore is a seaman because he is doing a seaman's work, incurring seamen's hazards, and is entitled to a seaman's traditional protection. Thus the shipowner's warranty of seaworthiness extended to the benefit and protection of Grzybowski as fully and completely as though he had been a member of the ship's crew.
>
> Furthermore, a shipowner is not relieved of his responsibility and obligation even though the appliances, appurtenances and equipment used in the work are furnished by the stevedores themselves.
>
> Here the pine jelly soap, the use of which is asserted by the plaintiff to have created an unseaworthy condition which caused his injury, was furnished by Nacirema from its gear shop. * * *"

Certainly in the *Grzybowski* case the vessel was at all times staunch and fit for the service intended, i.e., receiving the cargo which was to be loaded. Like the case at bar there was nothing wrong with the hatch within which the cargo was to be loaded but nevertheless the Court held, and properly so, that if the introducing into the hatch of a dangerous condition which made the place not reasonably fit to do the work required of the longshoremen with safety

an unseaworthy condition was created for which the shipowner is liable.

The Court of Appeals in its opinion of May 17, takes the same position as it did in its previous opinion and places again emphasis on the absence of notice on the part of the shipowner as grounds for its affirmance of the Trial Court's judgment denying recovery simply because the shipowner did not *expect* nor did it intend to have contaminated grain placed in the hold. This gets back again to the doctrine of notice which this Court has time and again held was not a prerequisite to the imposition of liability once the unsafe condition producing injury had been established. In the case at bar the Court found the dangerous condition to have existed proximately causing Petitioners' injuries. It is respectfully submitted that the case at bar like the *Mitchell* and *Grzybowski* cases presents a single issue whether with respect to so-called "transitory" unseaworthiness the shipowner's liability was limited by concepts of common-law negligence.

This Court *in Mitchell*, after clearly setting out the "absolute" duty being a species of liability without fault and that "due diligence of the owner" does not relieve him from this obligation, citing 328 U.S. 104, 66 S.Ct. 822, states as follows:

> "From that day to this, the decisions of this Court have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care. • • •
>
> "There is no suggestion in any of the decisions that the duty is less onerous with respect to an unseaworthy condition arising after the vessel leaves her home port, or that the duty is any less with respect to an unsea-

worthy condition which may be only temporary. Of particular relevance here is Alaska Steamship Co. v. Petterson, supra. In that case the Court affirmed a judgment holding the shipowner liable for injuries caused by defective equipment temporarily brought on board by an independent contractor over which the owner had no control. That decision is thus specific authority for the proposition that the shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability. That decision also effectively disposes of the suggestion that liability for a *temporary* unseaworthy condition is different from the liability that attaches when the condition is *permanent*." (Emphasis ours.)

Thus in the *Grzybowski* case, *supra*, the Court of Appeals states:

"In summary, as we interpret the Mitchell decision, the Supreme Court held that the character of the duty to provide a seaworthy vessel is absolute; that what is evolved is a complete divorcement of unseaworthiness liability from concepts of negligence; that, in determining whether the ship there involved was unseaworthy by reason of the slippery condition of the rail, *it was immaterial how the slime got there, who put it there, how long it had been there or whether the shipowner knew it was there;* that if the ship was thus rendered unseaworthy and the plaintiff suffered injury because of the condition, the shipowner was liable."

There is no real difference between the *Mitchell* case and the *Grzybowski* case and the case at bar. In the *Mitchell* case the ship's rail was "staunch" and a "fit" rail until it was covered with "slime and fish gurry." In the case at bar the hatch of the vessel was staunch and fit until the contam-

inated grain was in it in such quantity that it closed all openings rendering unfit the area in which the longshoremen were working so that they could do the work with safety. Indeed, this is conceded by the Court of Appeals. The reason assigned by the Court of Appeals for not imposing liability is because the owners did not "expect" the contaminated grain to be loaded into the hatch. This theory introduces the doctrine of notice and concepts of negligence not applicable under the circumstances in this case. In *Puerto Seguro Cia. Naviera, S. A.* v. *Petros Pitsillos*, 279 F. (2d) 599, C.A. 4th Circuit, the Court stated:

> (p. 600) "Since the argument before us the Supreme Court has reversed that decision in 362 U.S. 539, 549, 80 S.Ct. 926, 933, 4 L.Ed. 2d 941. This makes it unnecessary to inquire whether the condition found by the District Court was or was not transitory. The 'transitory unseaworthiness' doctrine has been laid to rest by the Supreme Court's square holding that 'the shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability,' and that Alaska Steamship Co. v. Petterson, 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed. 798, 'effectively disposes of the suggestion that liability for a temporary unseaworthy condition is different from the liability that attaches when the condition is permanent.'
>
> Affirmed."
>
> *Ruth Holley, Administratrix of the Estate of Edward J. Holley, Deceased* v. *THE MANFRED STANSFIELD*, 186 F. Supp. 212.

Notwithstanding this Court's order vacating the judgment of the Court of Appeals, 275 F. (2d) 191, it, yet without quoting, that Court again relied on the following cases:

Cookingham v. *U.S.*, 184 F. (2d) 213;
Hanrahan v. *Pacific Transport Co.*, 262 F. 951; cert. denied 252 U.S. 579, 40 S. Ct. 345, 64 L.Ed. 726;
Adamowski v. *Gulf Oil Corp.*, 93 F. Supp. 115, affirmed 197 F. (2d) 523;
Daniels v. *Pacific-Atlantic Steamship Co.*, 120 F. Supp. 96;
Garrison v. *United States*, 121 F. Supp. 617;
McMahan v. *The PANAMOLGA*, 127 F. Supp. 659;

all dealing with the doctrine of "transitory unseaworthiness" in sustaining the Trial Court's denial of recovery in the case at bar (see Court of Appeals' decision, 275 F. (2d) p. 195), notwithstanding *Mitchell, supra, Petterson* v. *Alaska Steamship Company*, 205 F. (2d) 478 (9th Cir.), affirmed 347 U.S. 396, 74 S. Ct. 601, *Poignant* v. *United States*, 225 F. (2d) 295 (2nd Cir.), *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U.S. 336, 75 S. Ct. 382; *Grillea* v. *United States*, 232 F. (2d) 919, all called to the Court's attention. We submit that it cannot possibly be argued that the five hundred (500) bushels of grain treated with poisonous and noxious chemicals poured into the hatch completely closing it, shutting off all air, trapping these longshoremen in the hold filled with poisonous gases (see Findings of Facts No. 9, T.R. p. 85) did not render that portion of the vessel not reasonably suited for the purpose for which it was intended, among which is, longshoremen working in it. Neither can it be successfully argued that a hatch, filled with grain, in which a number of longshoremen are working, with very little area in which to work, find the only opening suddenly covered by grain containing noxious and poisonous gases and fumes as reasonably fit to work in with safety.

See Judge Skelly Wright's opinion in *Casbon* v. *Stockard Steamship Corp.*, 173 F. Supp. 845. He aptly expresses himself as follows:

> "Despite much weeping and gnashing of teeth by interests adversely affected, the doctrine of liability without fault remains firmly embedded in the general maritime law • • •
>
> "It would seem certain, at least as of now, that the warranty of seaworthiness applies to those shore workers who perform duties on board a vessel traditionally performed by seamen. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143; Seas Shipping Co. v. Sieracki, supra. To these workers is owed the nondelegable duty to provide a reasonably safe place to work, as well as reasonably safe appliances with which to perform the work. Manich v. Southern Steamship Co., 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561. *This duty cannot be contracted away* by requiring the shoreside contractor to supply the men and the equipment, nor can it be avoided by abandoning part of the vessel to such contractors."

In *Grillea* v. *U. S.* (2nd Cir.), 232 F. (2d) 919, a longshoreman fell into the hold when the vessel became unseaworthy due to his own negligence or the negligence of his companion, or both, in selecting the wrong hatch cover to place over the padeye. The Court stated:

> ". . . It may appear strange that a longshoreman, who has the status of a seaman, should be allowed to recover because of unfitness of the ship arising from his own conduct, in whole or in part. However, there is in this nothing inconsistent with the nature of the liability because it is imposed regardless of fault; *to the pre-*

scribed extent the owner is an insurer though he may have no means of learning of, or correcting the defect."

"The Supreme Court recently reaffirmed the doctrine in Alaska Shipping Company v. Petterson, 347 U.S. 396; and we have since followed suit in Poignant v. U.S., 225 F. (2d) ——."

To the same effect *Pacific Far East Line* v. *Williams*, 234 F. (2d) 378; *Rodriguez* v. *The Texas Company*, 254 F. (2d) 295; *Sprague* v. *The Texas Company*, 250 F. (2d) 123; *Boudoin* v. *Lykes Bros. Steamship Co.*, 348 U.S. 336; 75 S. Ct. 382; *Johnson Line* v. *Maloney*, 243 F. (2d) 293 (9th Cir.).

Under the above authorities and especially under the *Mitchell* case, the Trial Court's Findings of Facts 9-10 and 11 and both opinions by the Court of Appeals in fact establish unseaworthiness. Thus we find the following statement by Judge Hutcheson:

"As we stated in our former opinion: 'This is a case of a happening "when the last batch of wheat came out of the funnels", instantaneously rendering unfit quarters which until then had been, and, when the funnels cleared away, continued to be, entirely seaworthy' for her intended service, the receipt of uncontaminated grain."

The Court of Appeals holds that because the hatch was rendered *instantaneously* unfit quarters causing injury to longshoremen liability would not impose. This is obviously contrary to this Court's decision in *Mitchell* and the cases hereinabove cited. One cannot accept the proposition simply because the dangerous or unfit condition lasted but a short time absolves the owner from the legal liability im-

posed by the doctrine of seaworthiness. Neither can one accept the proposition that notice is a necessary element in the so-called "transitory" unseaworthiness cases. All Courts have rejected the argument that every condition not directly connected with the physical structure of a vessel rendering the area not reasonably fit to do the work with safety does not impose liability. To do so would be to run contrary to the many prior decisions of this Court in unseaworthiness cases. To allow this decision to stand would reinstate the conflict and confusion generated by the *Cookingham* doctrine and weaken if not destroy what this Court has said many times that the shipowner has an "absolute and non-delegable" duty to provide and *maintain* a seaworthy ship. It is pertinent to define what the word "absolute" means. By definition of Webster's New International Unabridged Dictionary, 1955 edition, "absolute" is defined as "* * * not relative * * *." If one relies upon this definition when this Honorable Court uses the word "absolute" in connection with the warranty of seaworthiness, there can be no qualification, limitation or restriction, and the transitory, unexpected or temporary unseaworthiness doctrine should have no acceptance or following in the courts. To stress the "transitory" or unexpected nature of the dangerous condition is to invoke concepts of negligence, which this Court rejected as unsound doctrine in the *Sieracki, Petterson, Boudoin* and *Mitchell* cases. In the long line of cases including *Sandanger, The OSCEOLA,* 189 U.S. 158, 173-175, 23 S. Ct. 483, *Sieracki, Petterson, Poignant, Mahnich, Boudoin, Williams, Grillea,* and others as relied upon by the Petitioners to sustain their position that even where the unseaworthy condition may be instantaneous or a temporary or transitory nature or appearing suddenly and unexpectedly, notice to the shipowner is not required to establish liability.

Proposition Number Four

In view of the knowledge Respondents, City of Galveston and Cardigan Steamship Company, through its agent, Texas Transport & Terminal Company, have had of at least four prior similar incidents in which a substantial number of longshoremen were injured while trimming grain under exactly the same circumstances, Respondents' failure to test the grain as it left the last bin of the City's warehouse, and before it was channeled into the spout while loading the vessel, constitutes actionable negligence.

Argument and Authorities

Since it is undisputed, and the Court found, that both the City of Galveston and Cardigan's Agent, Texas Transport & Terminal Company, knew of at least four prior occasions when longshoremen, like Petitioners, received injuries under similar circumstances the SS DAPSCOMB LYKES, where substantial sums of money have been paid by way of damages by the City of Galveston to one hundred fifty (150) longshoremen, The City, as well as Respondent's, Cardigan's, Agents, had notice that such conditions may very likely arise, yet, no precautions were taken by Cardigan or its Agents, and no tests conducted by either the City, or Cardigan, to determine the condition of the grain at the shipping bin above the shipping gallery and immediately above the ship to be loaded and before it was spouted into the hatch of the vessel. It is undisputed that neither the City nor the ship made any test to determine the chemical contents for fumigants put on the grain before it reached Galveston (R. pp. 381 through 391 witness Buest); the testimony of Traffic Manager for Texas Transport & Terminal Company, witness Gardner, Cardigan's Agent (R. pp. 585 through 590; General Manager of Galveston Wharves; wit-

ness W. H. Sandler). All the Respondent witnesses testified that no tests were made for the chemical content of the grain even though there was a good and convenient place at the last bin—i.e., the shipping bin—before the grain moved into the spout, to make such tests; that they knew that grain stored inland, before it is brought for storage, to the Galveston wharves is treated with fumigants (R. pp. 676 through 679—witness D. L. Carroll, General Foreman of the Galveston Wharves). This witness testified that no tests of the grain was made as it was loaded into the GRELMARION to determine whether it was safe for the men to trim that grain in the hatch of the vessel, even though this witness had knowledge (R. p. 679) of the incidents of the SS LIPSCOMB LYKES, MOORE-MACMOON, and ZOSIANNE.

Contrary to the Court's Finding No. 15, that no fumigants had been applied on this particular grain in the City's warehouse, the General Foreman of the Galveston Wharves, Mr. Carroll, and others, testified (R. 696 through 698 and R. 1047-1059) that certain grain fumigated in a certain bin of which a record is made is transferred to other bins but no record is kept of the grain so transferred, therefore, you often find fumigated grain in a bin of which there are no records of fumigation, in short, the record is only kept of *the bin* in which grain was fumigated but *not of the grain* (R. 697-698). Indeed, in response to questions put by the Court to the witness Mr. Carroll testified as follows:

> "Q. (By the Court) The point I am making is, if you don't know about these possible transfers from bin 1 to bin 2, how can you tell me conclusively that the grain from bin 2 that went into the vessels had not been (R. 698) switched around, and hence perhaps *hadn't* been fumigated? Do you follow me?

The Witness Carroll: "I follow you. There is a slight possibility that a small amount of that could have happened, yes.

The Court: And your records would not show the contrary?

The Witness: No.

The Court: Or wouldn't show either way?

The Witness: It wouldn't show either way."

Neither could this witness testify how long the grain that was loaded in the GRELMARION was in the bin, whether it was there two days or three months (R. pp. 704-709 and 723). This witness, too, knew about the previous experiences at the Galveston Wharves when longshoremen were overcome by chemicals with which the grain was treated while doing the same work as Petitioners.

None of the Governmental Agencies made any tests for the presence of chemicals on the grains. Their tests were *not* for the purpose of determining the presence of chemicals with which the grain was treated but rather *its grade*. The test invariably was made either out in the open air with a small sample of grain or sometime after the grain was removed from the bin in an entirely different atmosphere than the closed, airless hatch (R. pp. 830-837, 840-842; R. pp. 968-972, 1002-1005) in which these Petitioners were trapped. It is obvious that none of the tests made either by members of the Board of Trade, Cotton Exchange, Agricultural Department, or by the employees of the Galveston Wharves were for the purpose of determining whether it was fumigated or the extent of its fumigation.

This is clearly illustrated by the testimony of Mr. Billy Ray Goss, who at the time of the occurrence was a grain sampler for the Cotton Exchange and Board of Trade, Grain Department, at the spout as the grain entered the

hatch (R. pp. 1017-1018). He testified that it was not his job nor did he test grain whether it was fumigated or to smell the grain or anything like it (R. p. 1027).

The testimony of Goss, and others, conclusively proved that none of the tests made either by the Board of Trade, Cotton Exchange or Agriculture Department, had anything to do with the existence or non-existence of fumigants (R. p. 1026). When questioned by the Court Mr. Goss, who was present at the spout when the men were buried underneath the 500 bushels of contaminated grain stated as follows:

> "Q. Mr. Smelly, that is the gentleman, who testified before you?
>
> A. Yes, sir."

At that point the Court took over the examination of Mr. Goss, as follows:

> "The Court: Was he (Smelly) there at the time that you are talking about, do you remember, Mr.—
>
> The Witness: Well, I couldn't say whether he was exactly on the ship at that time, or not, but he could have been—this was on the forward end; he could have been on the back end, or something like that. Now, I couldn't definitely say that he was right there at that time, because I don't—I just don't remember.
>
> The Court: But you do definitely recall the men coming out of the hold and making this complaint?
>
> The Witness: Yes, sir, I recall men coming out of the hold—
>
> The Court: You remember that, and you are not relying on some record or notation you made.
>
> The Witness: No, sir, I am not relying on (R. 1027) anything. I remember that.
>
> The Court: Well, as the sampler there in charge of taking samples, didn't it ever occur to you to take a

sample there at that minute, just as it came out of the spout, when the men came out and said that there was something wrong?

The Witness: Well, they cut the grain off, and I may have just took a cut. I don't remember that, but the grain was cut off and—

The Court: It seems to me like that would be an awful good time to take a sample, when you *had some reason to think there was something wrong with it, wouldn't it?*

The Witness: *Well,—it is not my job to determine if it is fumigated or anything; it is not my job to smell of the grain or anything. My job is to cut the grain and check it for weevils, for weevils or things of that nature. I am not supposed to smell of the grain or anything like that.*

The Court: Well, whether you were supposed to or not, you do not remember taking a sample immediately after you found that some complaint was made about the grain, is that correct?

The Witness: No, sir, I do not remember, taking a sample at that time (R. 1028).

The Court: All right. Now did you report the matter to Mr. Smelly?

The Witness: I don't recall.

The Court: As far as you know, you said nothing whatsoever.

The Witness: That's right."

The record is replete with evidence, first, of knowledge on the part of the Galveston Wharf officials and its employees that the grain being stored in their facility was fumigated inland before it was brought to the wharf; second, it was fumigated in railroad cars while awaiting transfer to the wharf facilities (R. 1059-1060); third, fumigated

in the bins; and fourth, such fumigated grain was transferred from one bin to another and, therefore, no record was maintained from which it could be determined whether the grain from the bins which were loaded on the GREL-MARION were fumigated or not; fifth, that the employees for the City as well as the agents for Cardigan, knew of the previous incidents where longshoremen, such as Petitioners, were injured while trimming grain by reason of fumigants on such grain. In spite of all of that knowledge, nothing was done in furtherance of the non-delegable duty to afford protection to these workers either by way of testing or by putting in portable blowers, available to the industry, to make the hatch seaworthy and provide these Petitioners with a safe place in which to work. The United States Coast Guard books and literature available to the shipping industry show what measures and precautions should and could be taken in the event of an occurrence such as occurred here. (See Appendix "G" attached hereto.)

The fact that the Wharves in Galveston, or any other place for that matter might have customarily done the work in the manner followed by the City and Cardigan does not excuse the failure to take necessary precautions to make the hatch seaworthy and supply Petitioners with a safe place in which to work. Reasonable care required Cardigan to provide blowers and force draft ventilation in the bin where Petitioners were working since they knew through their agents, not only of the previous incidents which took place in the Port of Galveston, but they also knew and had available to them, the advice Governmental Agencies, i.e. the Coast Guard, gave to the industry to provide either forced ventilation or blowers for the very purpose of preventing asphyxiation and the danger to Petitioners in the event a portion of the grain may be filled with fumigants or other noxious and poisonous chemicals. (*United N. Y. &*

N. J. Sandy Hook Pilots Ass'n v. *Halecki*, 70 S. Ct. 517, 358 U.S. 613.)

Neither can the shipping industry, nor the wharves, hoist themselves by their own boot straps by the device of setting up standards of conduct throughout the industry amounting to something less than reasonable care under all the existing circumstances and then predicate a defense of such sub-standards. The Federal and State Courts have long since laid to rest the ghost of this argument. As stated in the *T. J. Hooper* case, 60 F. 2d 737, at page 740:

> "Is it then a final answer that the business had not generally adopted receiving sets? There are, no doubt, cases where Courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves. Ketterer v. Armour & Co. (C.C.A.), 247 F. 921, L.R.A. 1918D, 798; Spang Chalfant & Co. v. Dimon, etc., Corp. (C.C.A.), 57 F. 2d 965, 967. Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. *It never may set its own tests, however, persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.* * * *" (Emphasis ours.)

See also:

State v. *Clark*, 20 Atl. 2d 127, 130 (S. Ct. Del.).

> "But there is a more fundamental objection. The Sheriff was charged with a duty to exercise that degree of care in the keeping of the crane which men in general exercise over property of this class. The custom or

practice shown related only to the cares which Sheriffs of New Castle County were accustomed to exercise over ponderous property under levy. The substantive law tells us that the standard of conduct for negligences, and that standard is a final one, and not dependent upon the conduct of others. To take the conduct of others as furnishing a sufficient legal standard of negligence would be to abandon the [1]standards set up by the substantive law."

As stated by Justice Holmes, in *Texas & Pacific Ry. Co.* v. *Behymer*, 189 U.S. 468, 23 S. Ct. 652, 47 L. Ed. 905:

"What usually is done may be evidence of what ought to be done is fixed by a standard of reasonable prudence. What has been done by others previously, however uniform in mode it may be shown to have been, does not make a rule of conduct by which the jury are to be limited and governed, if they see in the case under consideration that it 'is not such conduct as prudent man would adopt in his own affairs.' Manard v. Back, 100 Mass. 40.

"Customs can not change the quality of an act; it can only aid in determining what that quality is. A party can not by his own continued negligence establish a custom by which he is made exempt from liability; nor is legal responsibility for negligence mitigated by the fact that others have been alike negligent. * * * "

It is, therefore, respectfully submitted that the Honorable Court of Appeals was in error in sustaining the Trial Court's finding that neither the City of Galveston nor Cardigan Shipping Company, Ltd. were negligent. And that

[1] Wigmore on Evidence, 934.

such finding is clearly erroneous under the facts in this case.

An Appellate Court has the authority to examine and review questions of facts constituting negligence. *Bonnewell* v. *U.S.*, 179 F. (2d) 411.

> *Anderson* v. *Lorentzen*, 160 F. (2d) 173;
> *McFall* v. *Compagnie Maritime Belge*, 1952 A.M.C. 1860.

In any event the clearly erroneous doctrine is not without limitations. In *Romero* v. *Garcia Diaz, Inc.*, 286 F. (2d) 347 (2nd Cir.) the Court clearly defines the scope of the clearly erroneous rule as follows:

> "Many decisions in this Circuit, some in civil actions and others in admiralty, have held that a judge's determination of negligence, as distinguished from the evidentiary facts leading to it, is a conclusion of law freely reviewable on appeal and not a finding of fact entitled to the benefit of the 'unless clearly erroneous' rule. Sidney Blumenthal & Co. v. Atlantic Coast Line R. Co., 2 Cir., 1943, 139 F. 2d 288, 290, certiorari denied 1944, 321 U.S. 795, 64 S. Ct. 848, 88 L. Ed. 1084; Barbarino v. Stanhope S.S. Co., 2 Cir., 1945, 151 F. 2d 553, 555; Kreste v. United States, 2 Cir., 1946, 158 F. 2d 575, 577; Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro, 2 Cir., 1947, 159 F. 2d 661, 665, certiorari denied 333 U.S. 836, 67 S. Ct. 1519, 91 L. Ed. 1849; Guerrini v. United States, 2 Cir., 1948, 167 F. 2d 352, 356, certiorari denied 335 U.S. 843, 69 S. Ct. 65, 93 L. Ed. 393; Johnson v. United States, 2 Cir., 168 F. 2d 886, 887; Lynch v. Agwilines, 2 Cir., 1950, 184 F. 2d 826, 828. Despite possible negative inferences that might have been drawn from McAllister v. United States, 1954, 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 20, we have continued to apply this rule

both in civil actions, Dale v. Rosenfeld, 2 Cir., 1956, 220 F. 2d 855, 858, and in admiralty, New York, New Haven & Hartford R. Co. v. Gray, 2 Cir., 240 F. 2d 460, 465, certiorari denied 1957, 353 U.S. 966, 77 S. Ct. 1050, 1 L. Ed. 2d 915; Verbeeck v. Black Diamond S.S. Corp., 2 Cir., 1959, 269 F. 2d 68, 70. The basis of these decisions is that determination of negligence involves first the formulation and then the application of a standard of conduct to evidentiary facts found to be established. When all this has been done by a judge, a reviewing court has no means of knowing whether he formulated the standard correctly, since he does not charge himself. Thus there must be free review of his ultimate determination of negligence although not of the facts on which it was based."

Proposition Number Five

The damages sustained by each Libellant, as found by the Trial Court, were grossly inadequate as a matter of law.

Argument and Authorities

On its face, it is clearly apparent that the damages the Trial Court found the Petitioners sustained, are, under the evidence, wholly inadequate. The evidence shows as a matter of law Petitioners to be entitled to damages far in excess of the amount found by the Trial Court.

Viewing the evidence as a whole, no matter how one looks at the total amount of damages the Court found Petitioners to have sustained, it is clearly inadequate and insufficient. The total amount of compensation received by these Petitioners plus the medical expenses paid out by their employer's insurance carrier is approximately from one-half to seventy percent (70%) of the total amount of damages

allowed by the Court. See intervention by Petitioners' employer's insurance carrier (T.R. p.). It is obviously insufficient because under the applicable compensation act, Title 33, Section 908, et seq., U.S.C.A., Petitioners were entitled to only two-thirds (⅔) of their average weekly wages, not to exceed Fifty-four Dollars ($54.00) per week, without considering pain and suffering, whereas by way of compensatory damages they are entitled to the full loss of their earning capacity, plus loss of future earning, plus compensation for the physical injury itself, which includes their inability to pursue generally the normal pursuits of life and the inconvenience of going through a period of time with an impaired bodily function. They are also entitled to damages for the fright, hysteria, pain and suffering sustained by them to the date of trial and beyond. Obviously, the Court took none of these facts into consideration. The evidence is undisputed that each of the Petitioners sustained substantial loss in earnings. All of them split their longshore work into three categories:

(1) On banana boats;

(2) Longshore work such as loading and unloading cargoes;

(3) Trimming grain.

Unloading of banana boats requires very little, if any physical exertion because it is done mostly by machinery and all petitioners are required to do is supervise. The loading of dry cargo and the trimming of grain is extremely hard and strenuous work. While it is true that none of them sustained any substantial incapacity for the work of unloading bananas, they all sustained substantial loss of earnings by reason of their inability to do longshore work requiring strenuous or hard work and in grain trimming aboard vessels.

Each of the eight injured Petitioners were paid by their employer's insurer sixty-six and two-thirds (66⅔) of their weekly wages as compensation under the Longshoremen's and Harbor Workers' Act, not exceeding $54.00 per week, Title 33, Sec. 908 et seq. and medical expense. When this action was filed, the insurance carrier, as permitted under the then provisions of the law, stopped payment of further compensation. The eight Petitioners were paid compensation as follows:

FIVE—were paid compensation for a period of seven weeks;

ONE —for a period of two weeks;

Two—for thirteen weeks total disability and fifteen weeks partial disability as follows:

Name	*Medical*	*Comp.*	*Total*	*Award*
The five paid compensation for seven weeks				
Jesse Ovalle	$216.75	$ 416.75	$ 633.32	$1,000.00
Juan Arrendondo	71.75	378.00	449.75	1,000.00
Apolonio Ovalle	200.25	424.29	624.54	1,000.00
Miguel Serrato	49.00	325.22	374.22	1,000.00
Nick De Leon	216.75	408.86	625.61	1,000.00
The one paid compensation for two weeks				
Fidencio Balli	8.75	56.52	64.27	500.00
The two paid compensation for 13 weeks total and 15 weeks partial				
Miguel Mejia	302.75	1,372.05	1,674.80[1]	1,500.00
Robert Morales	270.50	1,186.50	1,457.08	1,500.00

Without attempting to even intimate in the slightest that *any* of the awards are anywhere near adequate, it is apparent that the Court awarded the most to those who suffered the least.

After the trial was concluded, but before the Court rendered its findings of fact and conclusions of law, the em-

[1] Note: An error in addition in the stipulation filed sets out the total compensation and medical paid to be erroneously $1457.08 instead of the correct amount of $1674.80.

ployer's insurer filed its intervention to recover $5,903.59 paid petitioners as compensation and medical expenses, plus a claim of $1,750.00 as attorneys' fees or a total of $7,653.59 claim out of the total $8,500.00 awarded by the Court to all of the Petitioners. Therefore, out of the award of damages as made by the Trial Court to each Petitioner may be deducted the monies to be paid to intervenors, which may have to include their claim for attorneys' fees, as follows:

Name	*Comp. & Medical*	*Award*	*Balance*
Jesse Ovalle	$ 633.32	$1,000.00	$366.68
Juan Arrendondo	449.75	1,000.00	550.25
Apolonio Ovalle	624.54	1,000.00	375.46
Miguel Serrato	374.22	1,000.00	625.78
Nick De Leon	625.61	1,000.00	374.39
Robert Morales	1,457.08	1,500.00	42.92
Miguel Mejia	1,674.80	1,500.00	174.80 (Minus)
Fidencio Balli	65.27	500.00	434.75

This $1,750.00 claimed by intervenors as attorneys' fees will have to be paid out of the net amount left to the seven of these workmen. Miguel Mejia being completely struck out by his employer's insurance claim for subrogation since intervenors' claim against him is $174.80 in excess of the total amount awarded him by way of damages.

An examination of Petitioners' Appendix 10 (stipulation of each Petitioner's earnings for the year 1956 before they received their injuries and 1957, the year of their injuries) evidences the substantial losses they sustained during the year of 1957 without taking into consideration the loss sustained by them subsequent to 1957 to the date of trial, and in the future.

For the Court's convenience we set them out below:

			Total Earnings	*Loss*
		MIGUEL MEJIA		
1956,	the year previous to his injuries, his earnings doing general longshore work, other than unloading bananas	$4,249.97		
1)	Earnings unloading bananas	1,131.03	$5,381.00	
1957	Earnings doing longshore work other than unloading bananas	1,945.94		
	Earnings loading bananas	1,154.06	3,100.00	
	An actual loss in 1957 in the sum of			$1,149.49
		ROBERT MORALES		
1956,	the year previous to his injuries, his earnings doing general longshore work, other than unloading bananas	$3,086.45		
	Earnings unloading bananas	1,767.89	4,854.34	
1957	Earnings doing general longshore work, other than unloading bananas	1,222.47		
3)	Earnings longshoring bananas	1,808.90	3,031.37	
	An actual loss in 1957 in the sum of			1,822.97
		NICK DE LEON		
1956,	the year previous to his injuries, his earnings doing general longshore work, other than unloading bananas	$3,527.41		

			Total Earnings	*Loss*
2)	Earnings unloading bananas	1,840.70	5,368.11	
1957	Earnings doing general longshore work, other than unloading bananas	1,124.90		
	Earnings unloading bananas	1,805.83	2,930.73	
	An actual loss in 1957 in the sum of			2,402.51

A. R. OVALLE

1956,	the year previous to his injuries, his earnings doing general longshore work, other than unloading bananas	$3,715.89		
5)	Earnings unloading bananas	1,725.04	5,440.93	
1957	Earnings doing general longshore work, other than unloading bananas	2,341.93		
	Earnings unloading bananas	1,790.26	4,132.19	
	An actual loss in the sum of			1,308.74

JESSE OVALLE

1956,	the year previous to his injuries, his earnings doing general longshore work, other than unloading bananas	$4,042.57		
4)	Earnings unloading bananas	1,927.81	5,970.38	
1957	Earnings doing general longshore work, other than unloading bananas	2,650.87		
	Earnings unloading bananas	1,749.54	4,400.41	
	An actual loss in 1957 in the sum of			1,569.97

J. ARRENDONDO

			Total Earnings	*Loss*
1956,	the year previous to his injuries, his earnings doing general longshore work, other than unloading bananas	$1,735.79		
6)	Earnings unloading bananas	1,992.10	3,727.89	
1957	Earnings doing general longshore work, other than unloading bananas	502.92		
	Earnings unloading bananas	2,058.37	2,561.29	
	An actual loss in 1957 in the sum of			1,166.60

MIGUEL SERRATO

1956,	the year previous to his injuries, his earnings doing general longshore work, other than unloading bananas	$3,392.55		
7)	Earnings unloading bananas	231.44	3,623.99	
1957	Earnings doing general longshore work, other than unloading bananas	1,676.35		
	Earnings unloading bananas	1,436.77	3,113.30	1,676.35
	An actual loss in 1957 in the sum of			510.69

F. BALLI

1956,	the year previous to his injuries, his earnings doing general longshore work, other than unloading bananas	$1,248.26		
	Earnings unloading bananas	1,761.74	3,010.00	

			Total Earnings	*Loss*
1957	Earnings doing general longshore work, other than unloading bananas	70.19		
	Earnings unloading bananas	2,143.64	2,213.83	
	An actual loss in 1957 in the sum of			796.17

These figures represent actual losses of earnings during 1957 and without taking into consideration the loss of earnings to the date of trial (July 1958) or in the future, nor medical expenses, damages for pain and suffering, etc. From the foregoing figures it is crystal clear that these Petitioners were not awarded even the loss of actual wages during the year of 1957.

The elements of damages to be considered in cases such as these have been heretofore discussed. We trust that it would be of aid to the Court to set out under each of Petitioners' names a formula awarding fair and reasonable but adequate damages suffered by each one of them.

JESSE OVALLE

1956	Total Earnings	$5,970.38		
	Of which longshoring work (trimming grain and loading or unloading cargo other than bananas) was		$4,042.57	
1957	Earnings in longshoring work (trimming grain, loading and unloading cargo other than bananas) was		$4,042.57	
	Loss in wages in 1957			$1,391.70
	In view of the hysteria and his fear to work with grain in the future, loss of wages in the future can be reasonably and conservatively set at			$1,000.00
	Medical expenses (as per stipulations)			216.75
	Pain and suffering, including fright and mental anguish should be conservatively set at			1,500.00
	Total Damages			$4,108.45

FIDENCIO BALLI

1956	Total Earnings	$3,010.00	
	Earnings other longshoring work, other than bananas	$1,248.26	
1957	Earnings other longshoring work, other than bananas	70.19	
	Loss in wages in 1957		$1,178.97
	Loss of earnings in the future		1,000.00
	Medical expenses		8.75
	Pain and suffering		1,500.00
	Total Damages		$3,687.72

JUAN ARRENDONDO

1956	Total Earnings	$3,727.89	
	Earnings other longshoring work, other than bananas	$1,735.79	
1957	Earnings other longshoring work, other than bananas	502.92	
	Loss in wages in 1957		$1,232.87
	Loss of earnings in the future		2,000.00
	Medical expenses		71.75
	Pain and suffering		1,500.00
	Total Damages		$4,804.62

MIGUEL MEJIA

1956	Total Earnings	$5,381.00	
	Earnings other longshoring work other than bananas	$4,249.97	
1957	Earnings longshoring work, other than bananas	1,945.94	
	Loss in wages in 1957		$2,304.03
	Loss of earnings in the future		2,000.00
	Medical expenses (see stipulation)		302.75
	Pain and suffering		2,000.00
	Total Damages		$6,606.78

APOLONIA OVALLE

1956	Total Earnings	$5,440.93	
	Earnings other longshoring work	$3,715.89	
1957	Earnings longshoring work, other than bananas	2,341.93	
	Loss in wages in 1957		$1,373.96
	Loss of earnings in the future		2,000.00
	Medical expenses		200.25
	Pain and suffering		1,500.00
	Total Damages		$5,074.21

MIGUEL SERRATO

1956	Total Earnings	$3,623.99	
	Earnings longshoring work, other than bananas	$3,392.55	
1957	Earnings other longshoring work, other than bananas	1,676.35	
	Loss in wages in 1957		$1,716.20
	Loss of future earnings		1,000.00
	Medical expenses		49.00
	Pain and suffering		1,500.00
	Total Damages		$4,265.20

ROBERT MORALES

1956	Total Earnings	$4,854.34	
	Earnings longshoring work, other than bananas	$3,086.45	
1957	Earnings longshoring work, other than bananas	1,222.47	
	Loss in wages in 1957		$1,863.98
	Loss of earnings in the future		2,000.00
	Medical expenses (see stipulation)		270.50
	Dr. Mendell		258.34
	Pain and suffering		2,000.00
	Total Damages		$6,392.82

NICK DE LEON

1956	Total Earnings	$5,368.11	
	Earnings longshoring work, other than bananas	$3,527.41	
1957	Earnings longshoring work, other than bananas	1,124.90	
	Loss in wages in 1957		$2,402.51
	Loss of earnings in the future		2,000.00
	Medical expenses (see stipulations)		216.75
	Dr. Mendell		222.83
	Pain and suffering		2,000.00
	Total Damages		$6,842.09

These losses are for actual loss of earnings during 1957 and without taking into consideration the loss of earnings to the date of trial (July 1958) or in the future.

The only possible reasoning the Court could have followed in arriving at the inadequate amount of damages it found to have been sustained by Petitioners is to assume that the Court considered their earnings while they were engaged in the extremely light and unstrenuous work of unloading bananas during the time they were under the care of their employer's insurance carrier's doctors and wholly disregarded the proven fact that Petitioners, because of the injuries they received, plus the hysteria and fear produced by the dramatic and fearful incident on March 14, 1957, on board the GRELMARION, they were unable to and did not work any grain ships and did very little work in loading or unloading other dry cargo ships all of which involved hard, strenuous labor. But even assuming the Court's disregard of the Petitioners' inability to work on dry cargo ships and grain trimming, it is difficult to understand how the Court arrived at such low figures in its damage finding. See *Davis* v. *Grace Steamship Co.*, 10 F. Supp. 284. In the *Davis* case, the Court under similar circumstances but only five days loss of earnings, allowed Libellant $750.00 by way of damages. The Court found Davis' injury to have oc-

curred on September 9, 1953, at which time he was suffering from no ill effects. Keeping in mind that in 1953 longshoremen's wages were substantially less than in 1957, the Court allowed close to $750.00 for pain and suffering alone.

In order to properly and realistically evaluate the loss sustained by each of the Petitioners in this case the total scope of their work must be taken into consideration, not only part of it. Clearly these Petitioners prior to their injuries worked (a) banana boats (which is seasonal and does not involve any manual labor); (b) general loading and unloading of cargo of all types and commodities and (c) loading and trimming of grain. Both Dr. Jenkins and Dr. Adriance have testified to the actual organic damages and injuries to each one of these Petitioners and both of them testified that in addition to these injuries, and as a direct consequence thereof, each of them suffered of hysteria, danger of future injury if they were to come either in contact with grain or trimming grain. All the doctors advised them to stay away from grain boats for a substantial period of time because recurrent attacks by chemicals, such as these Petitioners were subjected to, injurious both to lungs and liver, may so aggravate their previous condition as to cause serious and permanent danger. All doctors, including those brought forward by Respondents, agreed that all of these men were suffering from hysteria, and that they needed medication, and constant reassurance so that they could return to normal work, with the exception of refraining from work with grain.

We respectfully urge this Court, after reviewing the evidence, to award damages for loss of actual earnings during the years 1957 and 1958, and an adequate and reasonable amount for the physical insult to their bodies and for pain and suffering, past and future. It is only then that justice under the law and in admiralty would be ac-

complished or alternatively remand the portions of this case dealing with damages to the Appellate Court for review.

It would serve no useful purpose to remand the case to the trial court in order to have a reassessing or reconsideration of damages as suggested in the dissent by Judge Rives.

Appellate Courts have the authority to review the sufficiency of damages and award damages that will fairly and reasonably compensate Petitioners for their hurt as warranted by evidence.

> *Imperial Oil Co., Ltd.* v. *Drlik,* 234 F. 2d 4;
> *John Farley* v. *United States,* 252 F. 2d 85;
> *Ross* v. *Zeeland,* 240 F. 2d 820;
> *Johnson* v. *Griffith S.S. Co.,* 150 F. 2d 224 (C.C.A. 9th Cir.);
> *The Mack,* 154 F. 2d 711 (C.C.A., 5th Cir.);
> *Waterman Steamship Corporation* v. *U.S. Smelting, Refining & Mining Company,* 155 F. 2d 687 (C.C.A., 5th Cir.);
> *Porello* v. *United States* (C.C.A., 2nd Cir.), 153 F. 2d 605; 330 U.S. 546, 67 S. Ct. 847;
> *Landgraf* v. *United States of America,* 75 F. Supp. 58, at p. 61;
> *In re Walsh, U.S. Fidelity & Guaranty Co.* v. *U.S.A.,* 1945 A.M.C. 1513 (C.C.A., 2nd Cir.), 152 F. 2d 46;
> *Stuart* v. *Alcoa S.S. Co.,* 1944 A.M.C. 911 (C.C.A., 9th Cir.), 153 F. 2d 178;
> *Wajdak* v. *United States of America,* 170 F. 2d 908.

The decision of the Court below is directly contrary to and in conflict with the Court decision of *Mitchell* v. *The Trawler Racer* of May 16, 1960. It is important that the

principles of Maritime Law be uniformly applied and enforced.

Conclusion

For the foregoing reasons, Petitioners respectfully pray that the judgment of the United States District Court and that of the Court of Appeals for the Fifth Circuit be reversed, and upon reversal, either increase the damages in an appropriate amount or remand the case to the Court of Appeals to consider the inadequacy of the damages.

Respectfully submitted,

MANDELL & WRIGHT

By ARTHUR J. MANDELL
Attorney for Petitioners

Appendix A

"9. The CRELMARION began loading the morning of March 13, 1957, and continued without incident throughout that day and the following morning, until interrupted for the lunch hour on March 14. When the longshoremen returned to work in the offshore bin of the No. 2 hold at about 1 p.m., on March 14, 1957, the bin was approximately three-fourths full, the grain then extending to within some four or five feet of the top of the bin. A last 'shot' of grain was called for, and was released into the bin. *This quantity of grain completely covered the hatch opening* (which was the only means of entrance and exit for the longshoremen, *and was the only source of ventilation*); the longshoremen were working *for the moment in an area, completely enclosed and without access to outside air.* This in itself was not an unusual incident. (Emphasis ours.)

10. Almost immediately the longshoremen felt ill effects. This was manifested by a burning and stinging sensation in the nose and throat, watering of the eyes, and a choking sensation. A certain amount of hysteria developed. The attention of those on deck was attracted, and the spout was shut off. The men dug a passageway through the grain and climbed and were assisted to the deck and the open air. Some experienced nausea and dizziness.

11. I find as a fact that certain noxious fumes and gases were introduced into the bin with the last 'shot' of grain which was loaded after 1 p.m., and that such fumes resulted from an insecticide applied at some point to destroy weevil infestation. I further find that the condition and complaints of the Petitioners were

not—as the Respondent City contends—attributable solely to a temporary oxygen deficiency in the bin, coupled with hysteria.

19. The finding heretofore has been made that the noxious gases and fumes were introduced into the bin with the last 'shot' of grain, and resulted from a fumigant that had been improperly applied, and that had adhered to the grain an unusually long period of time. • • • "